

HONORABLE ROBERT S. LASNIK

Trial Date: March 4, 2019

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

EL-FATIH P. NOWELL,

Plaintiff,

vs.

TRIMED AMBULANCE, LLC and KENT
FIRE DEPARTMENT REGIONAL FIRE
AUTHORITY aka PUGET SOUND
REGIONAL FIRE AUTHORITY and JOHN
DOES 1-4,

Defendants.

No. 2:17-cv-01133 RSL

DEFENDANT TRIMED AMBULANCE,
LLC'S REPLY BRIEF TO PLAINTIFF'S
RESPONSE TO DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiff's Response to TriMed's Motion for Summary Judgment does not overcome the arguments set forth in TriMed's Motion. In an attempt to conflate the issues and confuse the Court, Plaintiff files a single reply brief; despite both Defendants filing separate Summary Judgments with different legal arguments. Plaintiff's Motion is rife with unsubstantiated allegations, and the legal arguments are nothing more than conclusory allegations derived from Plaintiff's inflammatory, unsupported narrative.

Plaintiff does not cite any evidence from either TriMed or Kent RFA personnel—a total of five (5) depositions spanning multiple hours—in his entire Response. (*See* Decl. of Harold Franklin). Rather, Plaintiff relies on his own deposition testimony that was disputed by all TriMed and Kent RFA personnel, and disputed by several eyewitnesses to the accident. (*See* TriMed’s MSJ). These do not suffice. “[Plaintiff’s] only support for his claims ... are his own conclusory allegations, which are insufficient to defeat a motion for summary judgment.” *Rivera v. Nat’l R.R. Passenger Corp.*, 331 F.3d 1074, 1079 (9th Cir. 2003). Plaintiff’s tort claims are barred by the immunity provision of Washington’s Involuntary Treatment Act, and because TriMed did not act under the color of state law, his Civil Rights claims are also improper against TriMed. Defendant TriMed is entitled to Summary Judgment as a matter of law.

I. PLAINTIFF’S “LIST OF DISPUTED FACTS” DOES NOT CREATE A GENUINE ISSUE OF MATERIAL FACT AS TO TRIMED

Plaintiff purportedly identifies three disputed facts. None of these create a genuine issue of material fact as to TriMed. They are:

1. “Mr. Nowell denies that he was combative.”
2. “Mr. Nowell states that he was capable of making medical decisions on his own and was not a threat to himself and others.”
3. “Mr. Nowell believes that they used excessive and unnecessary force.”

Each ‘disputed fact’ is a conclusory, subjective statement by Plaintiff himself. “[Plaintiff’s] conclusory allegations unsupported by factual data are insufficient to defeat the [Defendant’s] summary judgment motion.” *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 922 (9th Cir. 2001).

All of Plaintiff’s facts are immaterial as applied to TriMed’s Motion. The decision to restrain Plaintiff was made independent of TriMed; whether he was combative or capable of

1 making medical decisions on his own does not impact TriMed's liability. The decision that
 2 Plaintiff was unable to care for himself and others, and thus should be involuntarily
 3 committed, was made by Kent RFA incident commander White and then confirmed by
 4 Officer Dorff. (*See* TriMed MSJ, p. 13-14). TriMed was only present to provide transport
 5 services at the direction of Kent RFA, TriMed did not make a determination as to Plaintiff's
 6 mental state. *Id.* Further, Plaintiff's subjective belief that Defendants used excessive and
 7 unnecessary force does not create a genuine issue of material fact. "[I]f the factual dispute is
 8 immaterial, it cannot be held to bar the granting of summary judgment." *British Airways Bd.*
 9 *v. Boeing Co.*, 585 F.2d 946, 952-53 (9th Cir. 1978).

11 **II. PLAINTIFF FAILS TO SHOW THAT WASHINGTON'S INVOLUNTARY** 12 **TREATMENT ACT DOES NOT APPLY TO THIS ACTION**

13 TriMed devotes a substantial portion of its Motion to Washington's Involuntary
 14 Treatment Act ("ITA"); specifically the immunity provision of RCW 71.05.120. Plaintiff's
 15 response to this argument spans approximately one page, cites an abbreviated version of the
 16 ITA's legislative intent, and then conclusively states the ITA "does not apply to the current
 17 case." (Plaintiff's Response, pp. 14-15). Plaintiff fails to address any portion of the actual
 18 immunity provision, fails to distinguish any of the cases cited by TriMed, and fails to even
 19 argue that TriMed acted with gross negligence or bad faith required to overcome the statute.
 20

21 Plaintiff argues that the ITA does not apply "because [Plaintiff] was not seeking
 22 mental health treatment nor was he seeking substance abuse treatment and there is no
 23 contention that his [*sic*] was mentally ill nor under the influence of any substance."
 24 (Plaintiff's Response, p. 15). But that is not the litmus test. There is no requirement that a
 25 patient has a diagnosed mental disorder or must seek substance abuse treatment to fall under
 26

the ITA. Further, the Act broadly defines mental disorder as “any organic, mental, or emotional impairment which has substantial adverse effects on a person's cognitive or volitional functions.” RCW 71.05.020 (37). *See also In re Detention of R.S.*, 124 Wash. 2d 766, 771, 881 P.2d 972, 975 (1994) (“[The ITA] defines “mental disorder” broadly.”).

Regardless, numerous individuals observed Plaintiff’s altered mental state:

- Plaintiff’s co-worker, Mr. Demers, “found Mr. Nowell in the restroom sweating heavily and disoriented.” (Kent RFA MSJ, p. 4);
- Plaintiff’s supervisor, Ms. Forehand, “immediately recognized Plaintiff was “[i]n distress of some kind ... He was a little bit disoriented ... I observed [Plaintiff] slurring his speech.”” (TriMed MSJ, p. 4);
- Kent RFA incident commander White interviewed Plaintiff: “He was not – not responding appropriately ... he was taking a long time to respond ... he was repeating some things.” *Id.* at p. 5;
- Kent RFA personnel Strobel states “Plaintiff appeared lethargic, had slurred speech and wouldn’t focus on anything with his vision ... his speech pattern was slow and slurred.” *Id.*
- TriMed personnel McClaine stated “[Plaintiff] did not know where he was or what was going on or who the president was.” *Id.* at pp. 12-13.

The multiple observations of Plaintiff’s disorientation, confusion, and slurred speech fall under the ITA’s broad definition.

Furthermore, Plaintiff was restrained pursuant to the Involuntary Commitment form signed by Kent Police Officer James Dorff because he was exhibiting signs of a mental disorder. (TriMed’s MSJ, p. 11). TriMed, a private ambulance company, falls under the definition of “private agency” as used in the immunity statute RCW 71.05.120. The facts of this accident are the exact scenario envisioned by the legislature in drafting the ITA.

The Involuntary Treatment Act (“ITA”) establishes procedures for appropriate medical intervention when, as the result of a mental disorder, a person presents an imminent likelihood of serious harm.

1 ...
 2 [E]mployees performing functions necessary to the administration of the ITA
 3 enjoy qualified immunity for duties “performed in good faith and without
 4 gross negligence.” RCW 71.05.120 ... Covered functions include “the
 5 decision of whether to ... detain a person for evaluation and treatment.”

6 *Hood v. King Cty.*, No. C15-828RSL, 2017 WL 979024, at *5 (W.D. Wash. Mar. 14, 2017).

7 Plaintiff’s argument further misinterprets TriMed’s position by stating “the [ITA] does
 8 not relieve ... TriMed from liability in this case.” (Plaintiff’s Reply, p. 15). TriMed does not
 9 assert the ITA shields private actors from liability; rather, the ITA applies a heightened gross
 10 negligence standard to claims against actors performing their duties under the ITA. (TriMed
 11 MSJ, p. 11-12). *See also Jacksin v. City of Mountlake Terrace*, No. C16-1282JLR, 2017 WL
 12 841751, at *5 (W.D. Wash. Mar. 3, 2017) (“[E]ven an assessment under Washington’s [ITA]
 13 that was incomplete and unreasonable would not rise to the level of gross negligence.”).
 14 Plaintiff fails to even *assert* that TriMed acted with gross negligence or bad faith. On these
 15 grounds, his claim should be dismissed.

16 **III. PLAINTIFF’S ARGUMENT THAT TRIMED’S CONTRACT WITH KENT** 17 **RFA PLACES THEM UNDER THE COLOR OF STATE LAW IS FLAWED**

18 Plaintiff conclusively states because TriMed had a contract with Kent RFA to provide
 19 Basic Life Support services, “they were acting under the color of state law.” (Plaintiff’s
 20 Response, p. 9). Interestingly, Plaintiff concedes that “conclusory allegations that a private
 21 actor and state actor conspired are insufficient to state a claim under Section 1983.” *Id.*
 22 (internal citations omitted).

23 Plaintiff does not argue there is ““pervasive entwinement to the point of largely
 24 overlapping identity” between TriMed and the State. *Kuba v. Sea World, Inc.*, 428 F. App’x
 25 728, 731 (9th Cir. 2011) (internal citations omitted). Plaintiff also does not argue “the state is
 26

1 significantly involved in the specific activity of which the party complains.” *Lauderdale, v.*
 2 *Permanente Med. Grp., Inc.*, 845 F.2d 1029, 1029 (9th Cir. 1988) (citing *Watkins v. Mercy*
 3 *Med. Center*, 520 F.2d 894, 896 (9th Cir.1975)). Plaintiff also incorrectly states “Tri-Med
 4 tries to make a distinction between providing basic life support services versus advance life
 5 support services.” *Id.*

6
 7 In that regard, TriMed’s actual argument is two-fold. First, there exists no evidence
 8 that the state of Washington “is significantly involved in the specific activity of which the
 9 [Plaintiff] complains.” *Lauderdale*, 845 F.2d at 1029. Plaintiff fails to address this argument
 10 (and fails to even assert as much in the Complaint). Second, because TriMed had no contract
 11 with the state of Washington, this private ambulance company did not act under the color of
 12 state law. *See also Lauderdale*, 845 F.2d at 1029 (“Normally, private ... ambulance services
 13 do not act under the color of state law.”). Plaintiff’s focus on Basic versus Advanced Life
 14 Support is a red herring. As TriMed argues, the Ninth Circuit focuses on whether defendants
 15 have a contract with the forum state. *See Lopez v. Dep’t of Health Servs.*, 939 F.2d 881, 883
 16 (9th Cir. 1991) (“[The] Ambulance Service [is] under contract with the state ... These
 17 allegations ... support a section 1983 action.”). TriMed has no contract with the forum state;
 18 only with Kent RFA.

19
 20 Plaintiff also attempts to cite other insignificant distinctions in an attempt to detract
 21 from the ultimate point. Plaintiff offers no evidence that “there is a sufficiently close nexus
 22 between the State and the challenged action of the regulated entity so that the action of the
 23 latter may be fairly treated as that of the State itself.” *Angelone v. Furst*, No. C07-5538RJB-
 24 KLS, 2008 WL 4763351, at *2 (W.D. Wash. Sept. 19, 2008) (internal citations omitted).
 25 Plaintiff also cites to *Lopez*, which actually reiterates that the Ninth Circuit found state action
 26

1 because the ambulance service is “under contract with the [forum] state.” (Plaintiff’s
2 Response, p. 9). But there is no such contract here with the state.

3 In sum, Plaintiff offers no evidence of a contract or analytic support for the conclusion
4 that because TriMed has a contract with Kent RFA, TriMed acted under the color of state law.
5 Again: “conclusory allegations unsupported by factual data are insufficient to defeat the
6 [Defendant’s] summary judgment motion.” *Arpin*, 261 F.3d at 922. Plaintiff’s Section 1983
7 Claims should be dismissed.
8

9 **IV. PLAINTIFF’S RESPONSE FAILS TO ADDRESS THE PROCEDURAL** 10 **DEFECTS IN HIS COMPLAINT**

11 Nowhere in Plaintiff’s reply brief does he rebut TriMed’s arguments regarding the
12 pleading deficiencies in his Complaint. TriMed adopts and incorporates those arguments as
13 set forth in its original Motion. As this same forum has previously concluded:

14 Defendants also move to dismiss, arguing, inter alia, that a § 1983 claim
15 cannot be brought against them because Plaintiff did not plead that they acted
16 under the color of state law and because they are private entities. ... The Court
17 agrees with Defendants. ... Plaintiff has thus failed to state a claim upon
18 which relief can be granted.

19 *Robinson v. Seattle Police Dep’t*, No. C17-1187RSM, 2017 WL 4122583, at *2 (W.D. Wash.
20 Sept. 18, 2017). Additionally, in both the Complaint and Reply Brief, Plaintiff fails to allege
21 that TriMed acted with gross negligence or bad faith. This same forum has dismissed
22 Complaints for such deficiencies:

23 Plaintiffs do not allege that Medical Center Defendants acted either in bad
24 faith or with gross negligence as required to overcome the immunity statute.
25 ... Even assuming that the court could infer from Plaintiffs’ allegations that
26 [Defendant’s] assessment was incomplete or unreasonable, such allegations
are insufficient to state a claim against Medical Center Defendants because
they do not rise to the level of gross negligence or bad faith. ... Under RCW
71.05.120(1), Medical Center Defendants are immune from this claim, and
accordingly, the court dismisses it.

1 *Jackson*, 2017 WL 841751, at *5. Plaintiff's pleading defects, and failure to rebut them, are
2 fatal to his claim.
3

4 CONCLUSION

5 Plaintiff's reply brief does not create a genuine issue of material fact required to
6 overcome TriMed's Motion for Summary Judgment. Plaintiff fails to cite deposition
7 testimony from *any* of Defendants' representatives in this matter; instead relying on his own
8 subjective belief that "he was capable of making medical decisions on his own." (Plaintiff's
9 Reply, p. 4). Plaintiff argues that despite suffering from a previous ITA precipitated by chest
10 pains, and despite numerous individuals observing slurred speech, disorientation, and
11 confusion, he should have been allowed to drive home.
12

13 Plaintiff devotes minimal time to Washington's ITA, specifically RCW 71.05.120; and
14 fails to even assert that TriMed acted with gross negligence or bad faith. Nonetheless, the
15 evidence fails to show any evidence of negligence, assault and battery, and false
16 imprisonment on the part of TriMed regardless of the applicable standard.
17

18 Finally, Plaintiff's argument that TriMed acted under the color of state law relies on
19 the contract with Kent RFA—not the State of Washington. Plaintiff's claim is not supported
20 by the evidence or applicable law.

21 TriMed requests this Court summarily dismiss all of Plaintiff's claims asserted against
22 TriMed and GRANT Defendant's Motion for Summary Judgment.

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25 //

1
2 DATED this 10th day of August, 2018.

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CERTIFICATE OF SERVICE

The undersigned certifies that under penalty of perjury under the laws of the State of Washington that on the below date I caused to be served via CM/ECF the foregoing document on:

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SIGNED this 10th day of August, 2018, at Seattle, Washington.

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